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No. 80-39

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES T. VOLZ, PETITIONER

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner seeks review of the court of appeals' holding that Subsection (k)(5) of the Privacy Act of 1974, 5 U.S.C. 552a(k)(5), exempts from disclosure two paragraphs of a document containing information that was obtained under an express promise of confidentiality. Petitioner also challenges the court of appeals' holding that he is not entitled to attorneys' fees under 5 U.S.C. 552a(g)(3)(B).

1. Petitioner is a Special Agent of the Federal Bureau of Investigation who was suspended without pay for five days in 1976 for becoming improperly involved in the prosecution of a rape case that was within the jurisdiction of local law enforcement officials. After his suspension, petitioner requested that the FBI release to him all of the information collected during the investigation preceding

the disciplinary action. In response to this request, certain documents were released to petitioner in September 1976, and additional documents were released to him in May 1977 after he filed an administrative appeal with the Deputy Attorney General. Petitioner then brought this action in the United States District Court for the Western District of Oklahoma in June 1977, seeking release of the remainder of the information pertaining to him. Thereafter, in January 1978, the Department of Justice made a third release of documents to petitioner. This release consisted of four documents, including a three-page memorandum of information received from an attorney, Herman F. Socrider. Two paragraphs of that memorandum were excised when it was released to petitioner, and those paragraphs are the subject of this case.

The memorandum records the results of an FBI agent's interview with Socrider. Originally, Socrider requested that the entire report he held in confidence (Pet. App. A-1 to A-2). In December 1977, however, Socrider released the FBI from its pledge of confidentiality for all but two paragraphs of the report (*id.* at A-2). These two paragraphs contain information received by Socrider's law firm under confidential circumstances from a source whose identity has not been disclosed (R. 21).[1]

2. The district court ruled that 5 U.S.C. 552a(k)(5) does not exempt the information contained in the two paragraphs from disclosure because, in the court's view, the government had already identified Socrider as the source of whatever information was contained in the two paragraphs when it released the remaining portions of the memorandum to petitioner (Pet. App. A-6 to A-7). The

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[1]"R." refers to the record in the court of appeals.

court also awarded petitioner attorneys' fees in the amount of $1,200.00, as well as costs (Pet. App. A-8).

The court of appeals reversed, stating (Pet. App. A-3):

> The trial court's ruling fails to recognize the inextricable connection between the source and the substance of a confidential disclosure. Socrider obtained a lawful promise of confidentiality for the fact that he was the source of certain substantive information. That the information contained in the two paragraphs was a part of a broader body of information which has been released does not alter the result. Subsection (k)(5) protects the confidentiality of any substantive information provided by Socrider insofar as disclosure would reveal that he was the agency's source of that information.

The court of appeals also reversed the award of attorneys' fees and costs, concluding that "[a]lthough some information was released after the suit was filed, * * * [petitioner] has not 'substantially prevailed' " in this case (Pet. App. A-3).

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals.

a. The court of appeals correctly held that the two paragraphs of the memorandum at issue here are exempt from disclosure under the Privacy Act, because release of the information they contain would necessarily dislose "the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence * * *" (5 U.S.C. 552a(k)(5)). The FBI acknowledged that the information deleted in the two paragraphs was information that

Socrider had received from a person in his law firm, who, in turn, had received the information from a third person. Petitioner argues (Pet. 4) that the information cannot be withheld to protect the identity of the other person in Socrider's law firm or the third party because there has been no showing that the FBI made a promise of confidentiality to either. But no reason appears why direct contact between the government and the ultimate source of the information should always be necessary in order to find that the ultimate source is protected by a promise of confidentiality. Here, the particular information was furnished to a law firm under confidential circumstances, and Socrider received an express promise of confidentiality from the FBI when he transmitted the information to the government. In these circumstances, the ultimate source should be accorded protection of his identity just as if he had furnished the information on a confidential basis directly to the government.

It is not necessary to reach the question of protection of the identity of the third party source in this case, however. As the court of appeals held, the two paragraphs of the memorandum summarizing the interview with Socrider are exempt from disclosure under Subsection (k)(5) in any event because it is not possible to release those paragraphs without identifying Socrider as the immediate source of the hitherto undisclosed information the paragraphs contain.

Contrary to petitioner's contention (Pet. 5), 5 U.S.C. 552a(k)(5) protects from disclosure more than the mere fact that Socrider talked to the FBI about petitioner's suitability for federal employment. That Subsection necessarily protects the fruits of these conversations as well to the extent that release of the fruits would identify Socrider as their source. If Subsection (k)(5) did not furnish this protection, sources of confidential

information would be deterred from communicating freely with government agents if they believed that the mere fact that they communicated with those agents might at some point be divulged. Such an interpretation would undermine the very purpose of Subsection (k)(5) of protecting "the privacy of people who believe that they were speaking to Federal agents in a privileged fashion." 120 Cong. Rec. 40884-40885 (1974) (remarks of Rep. Erlenborn). Accordingly, the previous disclosure of Socrider as a source who furnished certain information to the government does not destroy his status as a confidential source for other information that has not been disclosed. Cf. *Scherer* v. *Kelley,* 584 F. 2d 170, 176 n.7 (7th Cir. 1978); *Keeney* v. *FBI,* No. 79-6267 (2d Cir. Sept. 3, 1980), slip op. 5438-5439 n.2.

Petitioner's construction of Subsection (k)(5) would also be counterproductive. It would deter sources from waiving pledges of confidentiality with respect to part of the information they furnished—and thereby furthering the purpose of the Privacy Act of providing maximum disclosure to the individual—because the sources would thereby waive confidentiality as to all information they had furnished. The Act does not require such a self-defeating, all-or-nothing approach. As the court of appeals stated (Pet. App. A-3):

> In this case the FBI went to great lengths to obtain permission to release the information contained in the three-page document. It was not required to do so. Its successful attempt to obtain release of but a tiny fraction of the memorandum was in keeping with the spirit of the Act. Any construction other than that which we give the Act would discourage such voluntary disclosures.

b. Petitioner is not entitled to attorneys' fees and costs. The Privacy Act expressly limits an award of attorneys' fees and costs to parties who have "substantially prevailed." 5 U.S.C. 552a(g)(3)(B). Compare *Hanrahan* v. *Hampton,* Nos. 79-912 and 79-914 (June 2, 1980).

The district court's award of attorneys' fees and costs was presumably based in large measure on a conclusion that petitioner had "substantially prevailed" in this case because the court had ordered disclosure of the two paragraphs in the memorandum of the Socrider interview—the only information that had not already been released by the FBI. The court of appeals correctly reversed the district court's order requiring disclosure of those paragraphs. As a result, petitioner obviously has not "substantially prevailed" on the principal issue in this case. As the court of appeals observed (Pet. App. A-3), some other information was released to petitioner after this case was filed. But seven of the 11 documents were released to him *before* this case was filed, and the remaining portions of the Socrider memorandum were later released only because Socrider waived the pledge of confidentiality with respect to these portions—something that petitioner could not have compelled him to do in the instant case. Thus, there is no basis for disturbing the court of appeals' conclusion that petitioner did not "substantially prevail" in this litigation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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